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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
10

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 vs.)

14 DAVID PEREZ-ALVAREZ,)

15 Defendant.)
16
17

2:11-cr-253-PMP-GWF

GOVERNMENT'S APPLICATION
FOR ORDER DEEMING ATTORNEY
CLIENT PRIVILEGE WAIVED

18 The United States of America, by and through DANIEL G. BOGDEN, United States
19 Attorney, and Brandon C. Jaroch, Special Assistant United States Attorney, respectfully requests that
20 this Court enter an order waiving the attorney-client privilege in 2:11-cr-253-PMP-GWF with regard
21 to Paul Riddle, Assistant Federal Public Defender.

22 This order is sought for the following reasons:

23 1. On April 12, 2012, the defendant, DAVID PEREZ-ALVAREZ, filed a motion
24 pursuant to Fed. R. Crim. P. 11(d)(2)(B) to withdraw his plea of guilty, as part of a signed plea
25 agreement, that was conditionally accepted by the Court on January 18, 2012. Included in his motion,
26

1 the defendant also moved the Court to dismiss the indictment. On April 16, 2012, this Court ordered
2 the Government to respond to the Motion to Withdraw Plea and Motion to Dismiss by May 31, 2012.

3 *See* Doc. 26.

4 2. The defendant was indicted on July 13, 2011 for being a Deported Alien Found
5 Unlawfully in the United States in violation of Title 8, United States Code (U.S.C.), Section 1326.
6 The defendant was represented throughout the proceedings by the Federal Public Defenders Office,
7 District of Nevada, from the time he was indicted until present counsel, Xavier Gonzales, Esq., was
8 substituted in on March 30, 2012. *See* Doc. 25. Paul Riddle, AFD, represented the defendant during
9 the plea negotiation with the United States Attorney's Office, District of Nevada, signed the plea as
10 defendant's counsel and was present during the defendant's change of plea hearing. *See* Doc.'s 11,
11 21.
12

13 3. The defendant, through counsel and in a sworn affidavit, now contends that Mr. Riddle
14 did not advise him that he could challenge the underlying deportation and removal order as improper
15 and, if successful, attempt to have the indictment dismissed. *Defendants's Motion to Withdraw and*
16 *Dismiss*, p. 18-19, 21-22. The defendant claims that had he been properly advised, he would have
17 elected to pursue that defense and not enter into a plea agreement. *Id.*
18

19 4. The voluntary disclosure by the defendant of privileged attorney communications
20 constitute waiver of the privilege as to all other such communications on the same subject. *Weil v.*
21 *Investment/Indicators, Research & Management*, 647 F.2d 18, 24 (9th Cir. 1981); *Clady v. County of*
22 *Los Angeles*, 770 F.2d 1421, 1433 (9th Cir. 1985).
23

24 Even when a party does not explicitly disclose the content of an attorney-client
25 communication, he may waive the privilege implicitly. A person cannot always
26 claim that he relied on counsel, while protecting what was said between them from
disclosure. As we have said, "The privilege which protects attorney-client

1 communications may not be used both as a sword and a shield. Where a party
2 raises a claim which in fairness requires disclosure of the protected communication,
3 the privilege may be implicitly waived.” (citations omitted).

4 *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997).

5 5. The government is requesting the waiver of attorney-client privilege with respect to Mr.
6 Riddle in an effort to determine whether he in fact did communicate these important issues with the
7 defendant. If Mr. Riddle did advise the defendant that there was a plausible challenge to his previous
8 removal, there would be “no newly discovered evidence, intervening circumstances, or [any] other
9 reason for withdrawing the plea that did not exist when the defendant entered his plea.” *United States*
10 *v. Davis*, 428 F.3d 805 (9th Cir. 2005). The defendant would have known about the possible
11 challenges but instead elected to enter into a beneficial plea agreement rather than a lengthy litigated
12 battle where he would remain incarcerated. Therefore, no new information or intervening
13 circumstances would justify the defendant’s motion to withdraw his plea. If the defendant was
14 properly advised, the Government will oppose the defendant’s motions to withdraw his plea and to
15 dismiss. If the Court denies the defense motions and accepts the guilty plea and requirements
16 contained in the plea agreement, the plea defendant will have given up most appellate rights but he
17 has reserved the right to collaterally challenge his conviction and sentence under 28 U.S.C. § 2255
18 for ineffective counsel. *See* Doc. 22. It is the very issue before this Court with his motion to
19 withdraw his guilty plea.
20

21 6. Ineffectiveness claims require a defendant to establish both deficient performance by
22 counsel as well as resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It would
23 seem proper at this point to have the attorney-client privilege waived to allow Mr. Riddle to speak to
24 the parties and the Court in an effort to make a record as to whether any deficient performance
25 26

WHEREFORE, based on the foregoing, the government respectfully requests that the attorney-client privilege in 2:11-cr-253-PMP-GWF be deemed waived as to all communication, information and work product relevant to the claims set forth in the defendant's Motion to Withdraw Guilty Plea Pursuant to Fed. R. Crim. P. 11(d)(2)(B) and Dismiss with respect to Mr. Riddle.

DANIEL G. BOGDEN
United States Attorney

/s/ Brandon C. Jaroch
BRANDON C. JAROCH
Special Assistant United States Attorney

1 UNITED STATES OF AMERICA,)

2 Plaintiff,)

3 vs.)

4 DAVID PEREZ-ALVAREZ,)

5 Defendant.)

2:11-cr-253-PMP-GWF

GOVERNMENT'S APPLICATION
FOR ORDER DEEMING ATTORNEY
CLIENT PRIVILEGE WAIVED

7
8 I, Brandon C. Jaroch, do hereby certify that on April 26, 2012, a copy of the attached
9 Government's Application for Order Deeming Attorney-Client Privilege Waived was sent by
10 electronic mail to the person hereinafter named, at the place and address stated below, which is the
11 last known address:
12

13 Addressee(s): Xavier Gonzales, Esq.
14 Counsel for defendant DAVID PEREZ-ALVAREZ
15
16
17

18 /s/ Brandon C. Jaroch
19 BRANDON C. JAROCH
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID PEREZ-ALVAREZ,

Defendant.

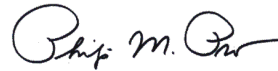
2:11-cr-253-PMP-GWF

ORDER

Based upon the pending application of the Government, and good cause appearing,

IT IS HEREBY ORDERED that the attorney-client privilege in 2:11-cr-253-PMP-GWF between the defendant and Paul Riddle, AFPD, be deemed waived as to all communication, information and work product relevant to the claims set forth in the defendant's Motion to Withdraw Guilty Plea Pursuant to Fed. R. Crim. P. 11(d)(2)(B) and Dismiss.

DATED this 27th day of April, 2012.



UNITED STATES DISTRICT JUDGE